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6 **IN THE SUPREME COURT**  
7 **STATE OF ARIZONA**

8  
9 **IN RE: PETITION TO AMEND THE**  
10 **ARIZONA RULES OF CRIMINAL**  
11 **PROCEDURE**

R-17-0002

ARIZONA BAIL BONDSMEN  
ASSOCIATION'S RESPONSE TO AMENDED  
PETITION TO AMEND THE RULES OF  
CRIMINAL PROCEDURE

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14 The Arizona Bail Bondsmen Association ("ABBA"), through undersigned counsel, hereby  
15 responds to the Amended Petition to Amend the Rules of Criminal Procedure and asks this Court to  
16 modify the proposed changed as discussed below.

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18 **Rule 7.1(b)**

19 The definition of an unsecured appearance bond should be modified to read as follows:

20 **Unsecured Appearance Bond.** An "unsecured appearance bond" is an undertaking, on a form  
21 approved by the Supreme Court, to pay the clerk a specified sum of money upon the defendant's  
22 failure to comply with the *appearance* conditions of the bond.

23 Including the word "appearance" into the definition helps to define the term and allows the bond  
24 poster (most likely the Defendant in this situation) to understand the amount of money would only be  
25 owed if the Defendant was to Fail to Appear for Court. This insertion allows to keep Bail Bonds  
26 appearance based rather than performance based.

1       **Rule 7.1 (c)**

2           The definition of a cash bond should be modified to read as follows:

3       **Cash Bond.** A “cash bond” is a secured appearance bond consisting of actual cash deposited by the  
4       defendant or someone acting on the defendant’s behalf ~~other than a professional bondsman.~~

5           The changes made to Rule 7 under No. R-16-0041 are in violation of Arizona Revised  
6       Statutes §§ 13-3967 and 13-3969, and the Arizona Constitution, Article 2, § 22. Sheriff’s  
7       Department employees are presently refusing to accept cash bail from professional bondsmen on  
8       behalf of pre-trial detainees. These detainees are thus being held without bond despite being fully  
9       eligible for release pending further adjudication. For example, out-of-state family members who  
10      wish to pay for bail on a credit card and have the bail bondsmen post the cash bail unable to do so  
11      anymore and are being forced to spend additional money to come to Arizona to post the bond instead  
12      of relying on licensed individuals. Strangely enough, the jail is accepting cash from a bail bondsmen  
13      if it is being used to pay for a secured appearance bond and not a cash bond. This policy does not  
14      make any sense and is making it more difficult for people with cash bond to be able to be released.  
15      This rules greatly reduces the resources available to post bail.

16           Furthermore, choosing a bail bondsmen to assist with bail does not solely mean that the job is  
17      over for the bondsmen once the Defendant is released. Instead the job has just begun. The bail  
18      bondsmen then has a duty, under their professional license with the Department of Insurance, to  
19      maintain regular and consistent contact with their Client (the Defendant). This includes weekly  
20      check-ins, check-ins after court appearances, software systems designed to assist the Defendant in  
21      remembering court dates, electronic monitoring in some circumstances. Using a bail bondsmen also  
22      provides the ability to use bail recovery agents in the event the Bond poster no longer wants to be a  
23      part of the bail bond. The Indemnitor can choose to revoke the bail bond even before a failure to  
24      part of the bail bond. The Indemnitor can choose to revoke the bail bond even before a failure to  
25      part of the bail bond.

1 appear violation so that the Defendant can be returned to custody and the bond money returned  
2 (required full return in this scenario under the new Rule 7.6). This happens quite often, especially if  
3 the Defendant begins talking about fleeing or using drugs. The Indemnitor has the ability to rectify  
4 the situation, contact the bail bondsmen, and return the Defendant to custody rather than wait for the  
5 Defendant to already use drugs, commit new offenses, or flee and have the warrant issued. The  
6 option to use a bail bondsmen and have the ability to use bail recovery agents, if needed, is safer for  
7 the community as well. When a Defendant is released with only a cash bond as a requirement then  
8 there are no check-ins, there is no supervision, the only way to know the Defendant was violating the  
9 terms and conditions of release is if they committed a new offense or failed to appear for Court. The  
10 police do not have the ability to put someone back in custody if the bond poster asks them to because  
11 they no longer want to be liable. Under the new definition of a cash bond, these options are taken  
12 away.  
13

14       Additionally, Article 2, section 4 of the Arizona Constitution provides, “No person shall be  
15 deprived of life, liberty, or property without due process of law.” *Arizona State Legislature*, “Arizona  
16 Constitution,” accessed April 25, 2017, “*nor shall any state deprive any person of life, liberty, or*  
17 *property, without due process of law.*” U.S. Constitution, Amendment 14, Sect. 1. Due process of  
18 law “in each particular case means such an exercise of the powers of the government as the settled  
19 maxims of law permit and sanction, and under such safeguards for the protection of individual rights  
20 as those maxims prescribe for the class of cases to which the one in question belongs.” *Pennoyer v.*  
21 *Neff*, 95 U.S. 733, 24 L.Ed. 565. Due process “means that no person shall be deprived of life, liberty,  
22 property, **or of any right granted him by statute**, . . .” (*Pettit v. Penn*, La. App., 180 So.2d 66, 69  
23 [Emphasis added]), and are the “[p]rocedural and substantive rights of citizens against government  
24  
25

1 actions that threaten the denial of life, liberty, or property.” Black’s Law Dictionary (9<sup>th</sup> Ed., 2009),  
2 available at Westlaw BLACKS.

3 "Where rights secured by the Constitution are involved, there can be no rule making or  
4 legislation which would abrogate them." *Miranda vs. Arizona* 384 US 436, 491. Here, the right to bail  
5 is secured by the Arizona and U.S. Constitutions. These revisions to the rules are restricting the  
6 ability to post bail for the Defendants in direct violation of Arizona Revised Statute § 13-3969.

7 The Maricopa County Sheriff’s Office is refusing to accept cash bail in the exact amount of  
8 the cash bond assigned by the judicial officer, not because the accused was not entitled to release  
9 from custody, but because the Arizona Supreme Court has, effective April 3, 2017, Amended Rule  
10 7.1 to limit submission of cash bonds to persons “other than” professional bail bondsmen. Article 2,  
11 Section 22(A), of the Arizona Constitution, provides that "[a]ll persons charged with crime shall be  
12 bailable by sufficient sureties, except" when charged with an enumerated offense and the proof is  
13 evident or the presumption great that they committed the offense. *Fragoso v. Fell*, 210 Ariz. 427, 434,  
14 111 P.3d 1027, 1034. The Arizona Constitution likewise prohibits "excessive bail." Ariz. Const. art. 2  
15 § 15. Because bail is designed, among other things, to assure the defendant's appearance at court  
16 proceedings, protect against intimidation of witnesses, and protect any victim or others, any bail set at  
17 an amount greater than necessary to achieve these purposes is excessive within the meaning of our  
18 constitution and is therefore prohibited. Ariz. Const. art. 2, § 22(B); see also *Gusick v. Boies*, 72  
19 Ariz. 233, 236, 233 P.2d 446, 448. (holding that any bail fixed at an amount more than necessary to  
20 assure a defendant's attendance at court is constitutionally excessive and therefore prohibited); see  
21 also Rule 7.2(a) (requiring imposition of "least onerous" release conditions if court determines  
22 release on defendant's own recognizance is insufficient to assure appearance). A court may not set  
23 bail in an amount calculated merely to keep a defendant in jail or as a form of punishment. *Gusick*, 72  
24  
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1 Ariz. at 236, 233 P.2d at 448. Bail is not deemed excessive, however, simply because the defendant  
2 cannot provide it. Id. at 237, 233 P.2d at 448.

3 Ariz. R. Crim. P. 7.1, as Amended April 3, 2017 states in pertinent part, “A ‘cash bond’ is a  
4 secured appearance bond consisting of actual cash deposited by the person released or someone on  
5 behalf of that person **other than a professional bondsman**. . . A ‘deposit bond’ is a partially-secured  
6 appearance bond in which the person, or someone on behalf of that person **other than a professional**  
7 **bondsman**, deposits a percentage of the full bond amount in cash.” [Emphasis added].

8 Here, the Arizona Supreme Court has pre-empted A.R.S. § 13-3969 which allows for a  
9 release bond, in the proper amount as ordered by a judicial officer, to be posted by “any person.”  
10 Quite simply, the bail system presently in place in Arizona as of April 3, 2017 is unconstitutional  
11 under the State Constitution and needs to be revised and the phrase “other than a professional  
12 bondsmen” should be removed for all the reasons discussed above.

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15 **Rule 7.1(d)**

16 The definition of a deposit bond should be modified as follows:

17 ~~**Deposit Bond.** A “deposit bond” is a partially-secured appearance bond in which the defendant, or~~  
18 ~~someone acting on the defendant’s behalf other than a professional bondsman, deposits a percentage~~  
19 ~~of the full bond amount in cash.~~

20 As previously discussed, this section is again in violation of A.R.S. 13-3969. However, even if  
21 the phrase “other than a professional bondsmen” was to be deleted and bail bondsmen were allowed  
22 to post these bonds, there would be substantial changes in the underwriting procedures associated  
23 with deposit bonds and bail bonds. State law governing professional bondsmen, through the  
24 Department of Insurance, mandates the minimum percentage of the bond which must be paid as  
25 premium is ten percent. Thus, there is a risk that professional bondsmen could be in violation of the

1 Department of Insurance regulations governing bail bonds if they were to assist with this type of bail  
2 bond.

3 Lastly, the creation of the deposit bond should not have been done through a rule change but  
4 rather a legislative change as it is a substantive rather than a procedural change. This change requires  
5 new training for judicial staff, new forms for release, new collection departments, and new bond  
6 forfeiture proceedings. This committee specifically addressed the ABBA's first round of comments  
7 and suggested changes to the bail forfeiture rules as "substantive changes" and would not address  
8 those requests, the same should be done here and this issue corrected as the rule is not only a  
9 substantive change, which should not have been done, but is also in violation of State Statute.  
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#### 11 **Rule 7.1(e)**

12 The definition of a secured appearance bond should be modified to read as follows:

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14 **Secured Appearance Bond.** A "secured appearance bond" is an appearance bond undertaking,  
15 on a form approved by the Supreme Court, to pay the clerk a specific sum of money upon the  
16 Defendant's failure to comply with the appearance conditions of the bond secured by deposit with  
17 the clerk of security equal to the full amount of the bond.

18 In order to keep this definition consistent with the definition of an unsecured appearance bond,  
19 the insertion of the underlined language is necessary. The same rationale for the insertion of  
20 "appearance" in the definition of unsecured appearance bond applies here as well.  
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#### 22 **Rule 7.1(g)**

23 The Definition of a Surety should be modified to read as follow:  
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25 **Surety.** A "surety" is a person or company, other than the defendant, who executes an appearance  
-- bond and agrees to pay the amount of the bond if the defendant fails to comply with the

1 appearance conditions of the bond. A surety must file an affidavit with an appearance bond  
2 stating that the surety is not an attorney or person authorized to take bail, and that the surety owns  
3 property in Arizona (or is an Arizona resident owning property) with a value equal to or more  
4 than the amount of the appearance bond. The property's value is calculated after deducting the  
amount exempt from execution and all liabilities, including the amount of any other outstanding  
appearance bonds that the surety has entered into involving the same property.

5 Currently, the surety companies who are the financial backers to the bail bondsmen only contract  
6 to pay for the face value of the bond if the Defendant was to fail to appear and the bond forfeited. A  
7 bail bond, as defined by the Department of Insurance, is an insurance policy which only cover the  
8 Defendant's appearance in Court. Department of Insurance's Website specifically tells consumers  
9 "If the court finds that the defendant failed to appear without good cause, the court will issue an order  
10 causing the person who posted bail to forfeit the bail to the court. If the court accepted a bail bond in  
11 lieu of cash, the surety company must pay the bail amount to the court, but has the opportunity to  
12 recover the bail amount by apprehending the defendant. The surety company may utilize a bail bond  
13 agent or bail recovery agent to arrest the defendant. [ARS § 13-3885\(A\) and \(G\)](#)." The general public  
14 and the Department of Insurance all have the understanding that a bail bond will only need to be paid  
15 to the Court if the Defendant was to violate the appearance condition, a warrant issued, and the bond  
16 forfeited. Inserting the "appearance conditions" portion into the definition will make sure the bail  
17 bonds are not sent to forfeiture court for lack of performance. For example, if the Defendant commits  
18 a new offense while on release within Maricopa County and is being in processed while they are  
19 suppose to be in Court, Rule 7.6(d)(3)(B) should mandate the exoneration but the Defendant did  
20 technically violate his conditions of release by committing a new offense and the bond could be sent  
21 to forfeiture court and ultimately forfeited for the Defendant's failure to follow the conditions of  
22 release. This is not only a hypothetical but does occur in bond forfeiture court. Inserting this  
23 definition into Surety will help assist in making clear definitions of when a bail bond can be forfeited.  
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1 **Rule 7.3(c)**

2 Rule 7.3(c) should be modified to read as follows:

3 **Discretionary Conditions in General.** The court may impose as a condition of release one or more  
4 of the following conditions, if, after reviewing the factors listed in A.R.S. § 13-3967(B), the court  
5 finds the condition is reasonably necessary to secure the defendant's appearance or to protect  
6 another person or the community from risk of harm by the defendant. In making this  
determination, the court must consider the results of a risk assessment approved by the Supreme  
Court or a law enforcement agency's lethality assessment, if any.

7  
8 A.R.S. § 13-3967(B) already sets out the factors the Court must consider before determining  
9 release conditions. Adding in this portion makes a clear definition that the Judges are not allowed to  
10 use the discretionary conditions until they have weighed all of the factors required under the Statute.

11 The same argument applies for Rule 7.3(c)(2)(A) which should be modified to read as follows:

12 ***Monetary Conditions.***

13 *Generally.* A court's imposition of a monetary condition of release must be based on an  
14 individualized determination of the defendant's risk of non-appearance, risk of harm to  
15 others or the community, the defendant's financial circumstances, and the other factors  
16 listed under A.R.S. § 13-3967(B). The court may not rely on a schedule of charge-based  
17 bond amounts, and it must not impose a monetary condition that results in unnecessary  
pretrial incarceration solely because the defendant is unable to pay the imposed monetary  
condition.

18  
19 **Rule 7.3(c)(2)(B)**

20 Rule 7.3(c)(2)(B) should be modified to read as follows:

21 **(A)** *Least Onerous Alternative.* If the court determines a monetary condition is necessary, it  
22 must impose the least onerous type of condition in the lowest amount necessary to secure  
23 the defendant's appearance or protect other persons or the community from risk of harm  
by the defendant. In the event of a Failure to Appear violation, the bond amount shall  
increase.

24 Under A.R.S. § 13-3967(B) and throughout the Arizona Rules of Criminal Procedure, the Judges  
25 are to look at the likelihood of the Defendant appearing in Court in determining release. If the Court



orders, as the least onerous condition, a low bond amount, and the Defendant fails to appear, there should be an automatic increase in the bond as the amount previously ordered was not enough to secure the Defendant's appearance. Over the past few months since the new rules went into effect, the Failure to Appear rate has significantly increased. The bond forfeiture calendar has become almost unmanageable requiring extra days for hearings per week and a waiting time frame of almost five months for a hearing based on the increased volume of bond forfeiture hearings. Clearly the new rules, which ultimately lowered the bond amounts, are allowing more people to be released from jail but are not effective in securing their appearance for future court dates. Inserting this provision requiring the bail amount to increase upon a failure to appear will help to assist with securing their appearance. As previously discussed, A court may not set bail in an amount calculated merely to keep a defendant in jail or as a form of punishment. Gusick, 72 Ariz. at 236, 233 P.2d at 448. Bail is not deemed excessive, however, simply because the defendant cannot provide it. Id. at 237, 233 P.2d at 448.

**Rule 7.6(d)(2)**

Rule 7.6(d)(2) should be modified to read as follows:

***Amount Returned.*** When a deposit bond or cash bond is exonerated, the court must order the return of the entire amount deposited to the bond depositor unless forfeited under Rule 7.6(c)(3) or the bond depositor authorizes it be applied to a financial obligation.

Inserting "to the bond depositor" helps to create a more clear definition of not only how much is being returned under this provision but also to whom. In some of the city courts, the bail money was being returned to the Defendant, used to pay fines or fees of the Defendant without the bond

1 depositor's approval, or not being returned until the Defendant paid all of their fines and fees. This  
2 insertion will help to eliminate those issues.

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4 **Rule 7.6(d)(2)(4)**

5 Rule 7.6(d)(2)(4) should be modified to read as follows:

6  
7 ***Conditions When Not Required to Exonerate Bond.*** The court is not required to exonerate the bond  
8 under subsection (d)(2)(C) if a detainer was placed on the defendant before the bond was posted and  
9 the bond poster had actual notice of the detainer or the release or transfer to another government  
10 agency was for 24 hours or less.

11 If a detainer was placed on a Defendant prior to the bond being posted but the bond poster  
12 never had notice of the hold, it would be very unfair to allow the bond to be forfeited under that  
13 condition. Inserting “ and the bond poster had actual notice” will make a clear definition of when the  
14 bond exoneration is not mandated. In Maricopa County, the bond poster must sign an  
15 acknowledgement that they know there is a hold on the Defendant and if the Defendant is transferred  
16 to another jurisdiction and they fail to appear for Court, the bond may be forfeited. This is a policy  
17 that is already in place and this rule change would make sure other counties followed a similar  
18 procedure if they wanted to argue for the bond to be forfeited.

19  
20  
21 **Conclusion**

22 The Arizona Bail Bondsmen Association is again very pleased to see bail reform and would like  
23 to actively participate and assist with these Rule revisions to propose rules that cover various  
24 scenarios. The proposed rule changes in the Petition are certainly in the right direction. The  
25

1 Association requests this Court to consider the proposed changes mentioned above and believes with  
2 these revisions there will be a substantial positive change in the bail bond industry.

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4 RESPECTFULLY SUBMITTED this 31<sup>th</sup> day of May, 2017.

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6 DUMOND LAW, PLLC

7  
8 By: /s/ Samantha K DuMond  
9 Samantha K DuMond  
10 *Attorney for the Arizona Bail Bondsmen*  
11 *Association*  
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